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No. 82-766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SECRETARY OF STATE OF MARYLAND,
Petitioner,

v.

JOSEPH H. MUNSON COMPANY, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Petitioner, Patricia G. Holtz, Secretary of State of Maryland, pursuant to Supreme Court Rule 22.5, files this brief in response to Respondent Munson's Opposition to Petition for Writ of Certiorari. Its purpose is to correct legal and factual misstatements contained in Respondent's filing and to amplify the latter's concession that "Petitioner has raised several important questions" in her Petition for Writ of Certiorari. *See Respondent's Brief in Opposition* at 12.

ARGUMENT

THE SUBSTANTIAL IMPORTANCE OF THE ISSUES IN THIS CASE IS EVIDENCED BY THE MANY STATES WITH CHARITABLE FUND-RAISING LAWS SIMILAR TO MARYLAND'S, THE SPLIT AMONG LOWER COURTS ON THE SCOPE OF THE *SCHAUMBURG* DECISION, AND THE MARYLAND COURT'S CLEARLY UNWARRANTED EXTENSION OF THAT CASE AND REJECTION OF ITS CAREFULLY DRAWN DISTINCTIONS.

At the outset it is important to note what Munson has conceded in its Brief in Opposition. Other than pointing out the obvious fact that cases in other jurisdictions do not involve precisely identical fund raising restrictions, Respondent does not bother to distinguish or discuss the split in authority among the lower courts on the scope of this Court's decision in *Village of Schaumburg v. Citizens for Better Environment*, 444 U.S. 620 (1980). It does not mention the many states with laws similar to that struck down by the Maryland Court and it concedes that the issues raised by Petitioner are important and unresolved. *See Respondent's Brief in Opposition* at 12. Munson's position comes down to the assertion that this case is "on all fours" with *Schaumburg* and that this is not the "appropriate vehicle" to resolve the important questions raised by the State of Maryland. This is simply not true.

First, the situation in *Schaumburg* is vastly different than that presented here. Munson is a professional fundraiser — a business — attempting to earn money from charities and other organizations. It is not an advocate. Although Respondent strains to squeeze his facts into the *Schaumburg* mold, the record will not permit it. Contrary to Munson's suggestion, *see Respondent's Brief in Opposition* at 2, there is not the slightest evidence that the State threatened Munson's "clients" with prosecution for exceeding the percentage limitation on fundraising. In fact, the Maryland Attorney General's office cautioned state offi-

cials to liberally administer the 25 percentage limitation of § 103D of Article 41. *See Petition for Certiorari* at 11-12.[1]

Second, *Schaumburg* involved a facial challenge to a *flat ceiling* on *all* non charity expenditures which had to be complied with *before* an advocacy group could register. It is hard to imagine a facial attack on a statute such as Maryland's, that both features an *elastic* and *generous* percentage limitation on *certain* fundraising expenses, and that does *not* involve prior restraint.[2] If ever a statutory scheme called for analysis on an "as applied" basis, it is this one.

Third, before even reaching the facial First Amendment issue in *Schaumburg*, this Court was careful to note a record of real and substantial overbreadth that is completely absent here.[3]

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[1] The only mention of an alleged threatened prosecution appears in Munson's complaint and amended complaint where it is stated that the firm's counsel was told that the State would seek prosecution of Munson if the latter did not register as a professional fundraiser under § 103L of Article 41. This assertion, which was denied by the Secretary, was never put to the test because Munson's § 103L count was dismissed for failure to exhaust administrative remedies. See Complaint, Count One at ¶9; Amended Complaint, Count One at ¶9; Answer at ¶7; and Memorandum and Order of the Circuit Court (May 25, 1978). Neither the complaints nor the stipulation filed below say anything about the threatened prosecution of advocacy groups.

[2] Munson has conceded to this Court that § 103D does not amount to a prior restraint. *Respondent's Brief in Opposition* at 3.

[3] Munson repeatedly implies that as a result of § 103D, *all* his advocacy-oriented clients will cease doing business with the firm. *Respondent's Brief in Opposition* at 2 and 10. However, according to the record in this case, during the four years this litigation was pending in state courts, only a single chapter of the Fraternal Order of Police (FOP) claimed to be "reluctant" to contract with Munson. Neither this organization or any other chapter of the FOP ever sought or was denied an exemption from § 103D. (App. 39a).

In short, there are a number of critical differences between the registration statute struck down in *Schaumburg* and the reasonable Maryland provision at issue here. If Respondent is correct, the distinction this Court carefully drew between the flexible limitation of *National Foundation v. Fort Worth*, 415 F.2d 41 (5th Cir. 1969), *cert. denied* U.S. 1040 (1970), and the ceiling in *Schaumburg* is indeed a paper one; and all the states with elastic percentage requirements like Maryland's should scrap them.

Contrary to Munson's contentions, there are no obstacles to review by this Court of the issues pressed by Maryland. Whether the state law constitutes a prior restraint or offends the First Amendment are federal constitutional questions, not mere issues of statutory interpretation. Nor would the allegations by Respondent of unbridled and unconstitutional discretion conferred upon state officials by way of the exception mechanism of § 103D furnish an adequate basis for upholding the decision of the Maryland Court.[4] Munson's argument is in reality one bottomed on assertions of prior restraint — a theory he abandoned both in the lower court and here.

[4] This issue was not decided by the Court of Appeals.

CONCLUSION

To justify review in this case, this Court need not rely upon Respondent's concession that the issues pressed by the State are important and unresolved. The questions presented are intrinsically significant because of their impact on other States, the efficiacy of their charitable fundraising regulations, and the integrity of this Court's decisions.[5] For these reasons and those stated in the Petition for Certiorari, we ask the Court to review the August 5, 1982 judgment of the Court of Appeals of Maryland.

Respectfully submitted,

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[5] Indeed, underlying the standing issue raised here is the unresolved question of the extent to which state courts are required to limit federal question standing in accordance with federal standards. *See* L. Tribe, *American Constitutional Law* § 3-18 (1978) (The issue "has long been the subject of confusion."). *Contrast* Tribe, *supra*, who urges no federal limits on state standing rules, *and* P. Freund, *Supreme Court and Supreme Law* 31 (1954) who contends that state courts are bound by this Court's federal question standing decisions.